Malayan Flour Mills Bhd v Saw Eng Chee (Administrator of the estate of Saw Cheng Chor, deceased) & Anor

HIGH COURT (IPOH) — CIVIL SUIT NO 22–289–1983
KANG HWEE GEE J
15 NOVEMBER 1996

Contract *— Formation — Subject to contract — Vendor's telex offer for sale of land accepted by purchaser — No express term that the offer or acceptance was subject to the preparation of a formal contract — No inference that parties intended the offer or acceptance to be subject to a contract being executed — Parties, subject matter, price and terms of payment identified in the offer — Whether the telex offer was subject to terms to be drawn up and agreed to by the parties — Whether parties bound by the bargain on the terms agreed*

Contract *— Offer — Counter-offer — Telex offer for sale of one lot of land — Subsequent negotiations between the parties for the sale of three additional lots — Second offer drafted for sale of the four lots — Vendor refused to proceed with the second offer — Whether the proposal for the sale of the additional three lots amounted to a counter-offer — Whether the purchaser could still accept the telex offer — Contracts Act 1950 s 7*

The first and second defendants were the registered co-proprietors of a piece of land ('Lot 5020'). On 12 January 1979, the defendants made an offer via telex ('the telex offer') to sell Lot 5020 for the sum of RM350,000 to the plaintiff. The plaintiff was to confirm the offer on or before 15 January 1979. On 15 January 1979, the plaintiff and the first defendant (acting for himself and the second defendant) discussed the sale of three other lots together with Lot 5020 for the additional price of RM120,000 making a total of RM470,000 for all four lots. This led to the drawing up of a letter of offer ('the second offer') by the defendants' solicitors for the sale of all four lots. After the second offer had been drawn up, the first defendant decided not to proceed with the offer, upon which the plaintiff then relied on and accepted the original telex offer. A cheque for the sum of RM47,000 being earnest money was enclosed with the letter of acceptance and was duly acknowledged by the solicitors for the defendants. The plaintiff claimed for the specific performance of the agreement with the defendants for the sale of Lot 5020. The defendants argued that: (i) the telex offer was subject to terms to be drawn up and agreed to by the parties; and (ii) they had already withdrawn the telex offer when they proceeded with the negotiations with the plaintiff to sell Lot 5020 together with three other lots.

Held, dismissing the plaintiff's claim:

(1) It was a matter of construction whether the agreement reached between the parties was subject to any further terms to be drawn up and agreed between the parties, ie whether it was 'subject to contract'.

In this case, the telex offer and the letter of acceptance did not state in any specific term that the offer or acceptance was subject to the preparation of a formal contract and neither could any inference be drawn that the parties had intended this to be so. The parties, the subject matter, the price and the terms of payment had been identified with sufficient clarity in the telex offer. So was the letter of acceptance which stated in no uncertain terms that the plaintiff was accepting the offer. Therefore, the parties were bound absolutely by the bargain on the terms agreed (see pp 771C–D and 772A–C); *Lim Keng Siong & Anor v Yeo Ah Tee* [1983] 2 MLJ 39, *Diamond Peak Sdn Bhd & Anor v DR Tweedie* [1982] 1 MLJ 97 and *Charles Grenier Sdn Bhd v Lau Wing Hong* [1996] 3 MLJ 327 distinguished.

(2) A counter-offer involved the introduction by the offeree of material variation of the terms of an offer of the same subject matter. In this case, by proposing to purchase all four lots, the plaintiff had not only varied the terms but also the subject matter of the original offer and in doing so, it had in fact made a counter-offer. This had diverted the mind of the first defendant away from his original telex offer, such that it could be legitimately assumed that he was no longer minded to keep the telex offer open, the effect of which was the same as if he had withdrawn that offer (see p 775A–C); *Tan Chee Hoe & Anor v Ram Jethmal Punjabi* [1983] 2 MLJ 31 and *Hyde v Wrench* (1840) 3 Beav 334 followed.

Obiter:

For the acceptance of the original offer to be effective, there must be a fresh offer on exactly the same term as in the original telex offer. As there was no evidence to indicate this, the receipt with the endorsement stating that the sum of RM47,000 was received, by itself, would not be sufficient evidence that a fresh offer had been made (see p 775D).

[Bahasa Malaysia summary

Defendan-defendan pertama dan kedua adalah tuan punya bersama berdaftar sebidang tanah ('Lot 5020'). Pada 12 Januari 1979, defendan-defendan telah membuat suatu tawaran melalui teleks ('tawaran teleks') untuk menjual Lot 5020 pada harga RM350,000 kepada plaintif. Plaintif harus mengesahkan tawaran itu pada atau sebelum 15 Januari 1979. Pada 15 Januari 1979, plaintif dan defendan pertama (yang bertindak untuk dirinya dan defendan kedua) membincangkan jualan tiga lot yang lain bersama dengan Lot 5020 pada harga tambahan RM120,000 berjumlah sebanyak RM470,000 untuk keempat-empat lot. Ini telah membawa kepada pembuatan suatu surat tawaran ('tawaran kedua') oleh peguamcara defendan-defendan atas jualan kesemua empat lot. Selepas tawaran kedua dibuat, defendan pertama membuat keputusan untuk tidak meneruskan dengan tawaran itu, dan plaintif kemudiannya bergantung kepada dan menerima tawaran teleks yang asal. Cek untuk jumlah RM47,000 yang merupakan wang cengkeram dilampirkan dengan

surat penerimaan dan diakui diterima oleh peguamcara defendan-defendan. Plaintif menuntut pelaksanaan spesifik perjanjian dengan defendan-defendan untuk jualan Lot 5020. Defendan-defendan berhujah bahawa: (i) tawaran teleks adalah tertakluk kepada terma yang bakal dibuat dan disetujui oleh pihak-pihak; dan (ii) mereka telah pun menarik balik tawaran teleks apabila mereka meneruskan perundingan dengan plaintif untuk menjual Lot 5020 bersama dengan tiga lot yang lain.

Diputuskan, menolak tuntutan plaintif:

(1) Adalah suatu perkara tafsiran sama ada perjanjian yang dicapai di antara pihak-pihak adalah tertakluk kepada apa-apa terma lanjut yang bakal dibuat dan disetujui antara pihak-pihak, iaitu sama ada ia adalah 'tertakluk kepada kontrak'.

Dalam kes ini, tawaran teleks dan surat penerimaan tidak menyatakan dalam apa-apa terma spesifik bahawa tawaran atau penerimaan adalah tertakluk kepada penyediaan suatu kontrak rasmi dan tiada apa-apa inferens boleh dibuat bahawa pihak-pihak bermaksud berbuat begitu. Pihak-pihak, perkara subjek, harga dan terma bayaran telah pun dikenal pasti dengan cukup jelas dalam tawaran teleks. Begitu juga dengan surat penerimaan yang menyatakan tanpa ragu-ragu bahawa plaintif akan menerima tawaran itu. Oleh itu, pihak-pihak terikat secara mutlak oleh perjanjian atas terma yang disetujui (lihat ms 771C–D dan 772A–C); *Lim Keng Siong & Anor v Yeo Ah Tee* [1983] 2 MLJ 39, *Diamond Peak Sdn Bhd & Anor v DR Tweedie* [1982] 1 MLJ 97 dan *Charles Grenier Sdn Bhd v Lau Wing Hong* [1996] 3 MLJ 327 dibeza.

(2) Sesuatu tawaran balas melibatkan pengenalan pengubahan material atas terma sesuatu tawaran pada perkara subjek yang sama oleh penerima tawaran. Dalam kes ini, dengan cadangan untuk membeli keempat-empat lot, plaintif bukan sahaja telah mengubah terma tetapi juga perkara subjek tawaran asal dan dalam berbuat demikian, ia sebenarnya telah membuat suatu tawaran balas. Ini telah mengalihkan minda defendan pertama daripada tawaran teleksnya yang asal, hinggakan ia boleh dianggap secara sah bahawa dia tidak lagi wajib terus membiarkan tawaran teleks terbuka, dan kesannya adalah seolah tawaran itu telah ditarik balik (lihat ms 775A–C); *Tan Chee Hoe & Anor v Ram Jethmal Punjabi* [1983] 2 MLJ 31 dan *Hyde v Wrench* (1840) 3 Beav 334 diikut.

Obiter:

Bagi memberi kesan kepada penerimaan tawaran asal, mestilah adanya satu tawaran yang baru atas terma yang sama seperti yang terdapat dalam tawaran teleks yang asal. Oleh kerana tiada keterangan untuk menunjukkan demikianlah keadaan di sini, resit dengan pengindorsan yang menyatakan bahawa jumlah sebanyak RM47,000 diterima

dengan sendirinya bukanlah bukti secukupnya bahawa satu tawaran yang baru telah dibuat (lihat ms 775D).] A

Notes

For cases on formation of contract, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1561–1600. B

For cases on counter-offer, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1930–1935.

Cases referred to

Ayer Hitam Tin Dredging Malaysia Bhd v YC Chin Enterprises Sdn Bhd [1994] 2 MLJ 754 (refd) C

Charles Grenier Sdn Bhd v Lau Wing Hong [1996] 3 MLJ 327 (distd)

Diamond Peak Sdn Bhd & Anor v DR Tweedie [1982] 1 MLJ 97 (distd)

Hyde v Wrench (1840) 3 Beav 334 (folld)

Lim Keng Siong & Anor v Yeo Ah Tee [1983] 2 MLJ 39 (distd) D

OTM Ltd v Hydranautics [1981] 2 Lloyd's Rep 211 (refd)

Tan Chee Hoe & Anor v Ram Jethmal Punjabi [1983] 2 MLJ 31 (folld)

Legislation referred to

Contracts Act 1950 s 7 E

JS Olikh (*Mrs Ong* with him) (*Joseph Tan & Tang*) for the plaintiff.
S Theivanthiran (*Thevin Chandran & Wong*) for the first defendant.
Tan Beng Hong (*Tan Beng Hong & Co*) for the second defendant.

Kang Hwee Gee J: F

The parties

The plaintiff is a limited company. The first defendant is the administrator of the estate of the late Saw Cheng Chor. The second defendant is the executor of the estate of the late Saw Eng Cheong. G

The conduct of this case

The hearing of this suit was commenced before Ong See Seng J on 11 February 1993 wherein it was agreed between the parties that the issue of whether there was a concluded contract be determined first, leaving the other issues, if necessary, to be decided later. H

His Lordship then left on retirement, having completed hearing only the case for the plaintiff. When the trial resumed before me, the parties agreed that it be continued by me from where it had been left with due reliance on the recorded notes of evidence. I

The facts

The following facts are not in dispute.

Saw Cheng Chor and Saw Eng Cheong were brothers and they were the registered co-proprietors of a piece of land held under State Lease No 680, Lot 5020, Mukim of Lumut ('Lot 5020') comprising an area of some six acres, the subject matter of plaintiff's claim. The said land adjoins the land the plaintiff is presently occupying. It has a sea frontage and a jetty.

The plaintiff was desirous of acquiring it for the purpose of their business expansion.

Sometime in the middle of 1978, Saw Eng Cheong had offered to sell the said land to the plaintiff company at the price of RM50,000 per acre. The offer was communicated through the plaintiff's managing director, Teh Liang Teik ('PW3'). The sale, however, did not materialize although it had progressed to a stage where a sale and purchase agreement had been prepared.

Sometime towards the end of 1978, Saw Cheng Chor called the plaintiff's managing director and offered to sell to the plaintiff the same piece of land for the price of RM350,000, together with three other lots in the same area comprisinga total of some 14 acres for the additional sum of RM120,000 (RM470,000 for all the four lots). The proposed sale also failed to materialize.

On 12 January 1979, Teh Liang Teik received a telex (exh P7) from Messrs Ngan & Tan, solicitors acting for Saw Eng Cheong and Saw Eng Chor, offering to sell Lot 5020 to the plaintiff for the sum of RM350,000. It read as follows:

> (1) We confirm our clients Saw Eng Cheong and Saw Cheng Chor's offer to sell you State Lease No 680 Lot 5020 Mukim Lumut in area six acres upon the following conditions:
>
> (i) Total price is RM350,000 payable within one month as follows:
>
> (a) RM250,000 cash
>
> (b) RM100,000 shares in Dindings Soya and Feedmill Sdn Bhd.
>
> (2) Permanent right of way of 66 feet width parallel to sea frontage to be granted to Ban Joo Seng Chan Sdn Bhd.
>
> Confirm if you accept this offer on or before 15 January 1979.

The plaintiff did not reply to the telex immediately. But on 15 January 1979, the plaintiff's managing director Teh Liang Teik accompanied by another director of the company, Lee Soon Lee (PW1) and the plaintiff's solicitor, Tang Khai Kit (PW2) went to meet Saw Cheng Chor at his office at Ban Joo Seng Chan Sdn Bhd in Sitiawan.

At this meeting, they discussed the sale of the three other lots offered earlier to the plaintiff. Saw Cheng Chor agreed to sell the three lots (which were registered in the name of Ban Joo Seng Chan of which both the Saws were partners) together with Lot 5020 to the plaintiff for the additional price of RM120,000 making a total of RM470,000 for all the four lots.

It was then decided that the plaintiff's solicitors, Tang Khai Kit and Saw Eng Chee (DW1), who is Saw Cheng Chor's son, should proceed to

the office of Messrs Ngan & Tan which was situated across the road to draw up a formal agreement incorporating the terms and conditions which they had agreed upon.

At the office of Ngan & Tan, a letter of offer (exh P8) was prepared by one Miss Chen Hong Eng, the solicitor acting for Saw Cheng Chor, for the sale of the three lots together with Lot 5020 at the agreed price, ie RM470,000.

The letter of offer read as follows:

M/s Malayan Flour Mills Bhd
Chartered Bank Building
9th Floor, Jalan Ampang
Kuala Lumpur.

Dear Sir,

Re: Disposal of land held under:
(1) State Lease No 680 Lot 5020 in area 6a or 00p;
(2) QT (R) Dgs 234/71 Lot 5342 in area 4.2372 acres;
(3) QT (R) Dgs 233/71 Lot 5341 in area 6.6639 acres;
(4) QT (R) Dgs 232/71 Lot 5340 in area 3.7116 acres.

We act for Messrs Saw Cheng Chor and Saw Eng Cheong both of No 17, Lumut Road, Sitiawan, Perak.

We confirm that our clients are the registered owners of the above mentioned land itemized (1). We further confirm our clients are the only partners in the firm known as Sykt Ban Joo Seng Chan which said firm is the registered owners of the above mentioned land itemized (2), (3) and (4). Our clients instruct us to state that they hereby offer to dispose off the same to you together with the buildings and infra-structures thereon and the jetty abutting therefrom (hereinafter collectively called 'the said land') subject to and upon the terms and conditions hereinafter contained:

(1) The total consideration is RM470,000 which shall be paid as to a sum of RM170,000 by cash and as to the balance thereof of RM300,000 in the form of shares in your subsidiary company Dindings Soya and Multifeeds Sdn Bhd to be issued in our clients' names or their nominees. The said sum of RM170,000 is compensation payment to our clients for the development costs incurred by them in relation to the said land. And the sum of RM300,000 is our clients' contribution towards the investment costs in and for Dindings Soya and Multifeeds Sdn Bhd.

(2) The said land is disposed with vacant possession and free from all encumbrances subject however to all conditions of title express or implied and restriction-in-interest.

(3) The total consideration of RM470,000 shall be paid at the times and in the manner following:

(i) a sum of RM170,000 in cash on the date of execution of the formal Agreement; and

(ii) the share certificates for RM300,000 shares in Dindings Soya and Multifeeds Sdn Bhd with our clients' names or that of their nominee(s) registered therein as the shareholders (hereinafter collectively called 'the said share certificate') shall be deposited

with us within six months from date of execution of the formal agreement failing which our clients shall be entitled to specific performance.

(4) The said sum of RM170,000 paid by you after deducting the estimated amount of real property gains tax payable by our clients shall be released to our clients after we have received written confirmation from you or your solicitors, M/s Joseph Tan & Tang of No 33C, Jalan Bandar Raya, Ipoh of the receipt of the following documents:

(i) the title deeds to the said land;

(ii) valid and registrable memoranda of transfer duly executed by our clients in favour of Dindings Soya and Multifeeds Sdn Bhd; and

(iii) the relevant stamp duty proforma.

(5) Our clients undertake that within 14 days after receipt of the said sum of RM170,000 from you by us they shall execute valid and registrable memoranda of transfer in respect of the said land and deliver the same together with the title deeds thereto to you or your solicitors.

(6) Our clients agree to execute and do all such acts documents and things as may be reasonably necessary to support any application by you to have the said land registered or vested in your name. The costs of such application would be borne by you.

(7) Our clients will give vacant and peaceful possession of the said land to you within 14 days after you have paid the sum of RM170,000 to us.

(8) All quit rent assessment rates and taxes and other outgoings together with all profits or rent in respect of the said land shall be apportioned as at the date of delivery of vacant possession.

(9) Within one month after execution of the formal agreement our clients will notify you in writing the particulars of nominees who are to receiver the said shares. in the absence of such written notification, you are at liberty to issue the said shares to our clients in equal proportions.

(10) The formal agreement shall be executed between you and our clients within 14 days from date of acceptance of this offer.

If you accept our clients' offer as stated herein, kindly sign and return to us the said copy of this letter together with a cheque for RM47,000 representing a deposit of 10% of the total consideration.

Yours faithfully,

I, Teh Liang Teik (NRIC No), the managing director of Malayan Flour Mills Bhd do hereby agree to and accept the abovementioned offer.

...

Teh Liang Teik for and on behalf
of Malayan Flour Mills Bhd.

cc Clients
M/s Joseph Tan & Tang, Ipoh.

By lunch time, Saw Cheng Chor and the others had by then gathered at the office of Ngan & Tan. Miss Cheng Hong Eng then read the letter to Saw Cheng Chor. By the time she finished, Saw Cheng Chor had changed

his mind. He decided not to proceed with the offer and instructed his solicitor not to sign it, saying he needed time to reconsider.

On the advice the plaintiff's solicitor, Tang Khai Kit, the plaintiff's managing director decided to revert back to the original telex offer to sell Lot 5020. He decided that the plaintiff should now accept this offer. Tang Khai Kit then prepared a letter of acceptance with the assistance of an office staff of Ngan & Tan. The letter (exh P9) signed by the managing director read as follows:

> We refer to your telex dated 12 January 1979.
>
> We hereby confirm acceptance of your client's offer to sell the above-stated land as per the conditions set out in your said telex.
>
> We enclose herewith as earnest money our cheque for the sum of RM47,000.
>
> Kindly sign and return to us the second copy of this letter by way of acknowledgement of receipt of this letter and the cheque.

The receipt of the letter exh P9 was acknowledged by the solicitors for Saw Cheng Chor.

A receipt for the payment of the cheque in the sum of RM47,000 (exh P10) was also issued to the plaintiff by Ngan & Tan on behalf of their client which read as follows:

> Payment to our account as stakeholders in respect of the disposal of State Lease No 680 by our clients Saw Cheng Chor and Saw Eng Cheong.

It is also not disputed that Saw Cheng Chor had authority to act on behalf of his brother Saw Eng Cheong in their negotiation on 15 January 1979.

The plaintiff's claim

The plaintiff's claim against the defendants is for specific performance of the agreement with Saw Cheng Chor and Saw Eng Cheong for the sale of the land Lot 5020 with special and general damages which it claims to have suffered as a result of the defendant's failure to perform.

In the alternative, it claims rescission of the said agreement with payment of special and general damages and the return of the earnest money of RM47,000 it paid to the defendant pursuant to the agreement with interests.

The defence

Both the first and second defendants put up a common defence. Apart from denying that they were liable to the plaintiff for any damages, their defence is two-fold:

(i) that the telex offer to sell Lot 5020 was subject to the terms to be drawn up and agreed to between the parties; and

(ii) that (in any case) they had already withdrawn their original offer by telex to sell Lot 5020 and had negotiated with the plaintiff to sell together all the four lots which unfortunately fell through.

These, incidentally, constitute the only two issues that I need to consider to dispose of this case.

First issue: Is the telex offer subject to terms to be drawn up and agreed to by the parties?

Assuming for the moment that there was an effective acceptance on the part of the plaintiff on the telex offer, the issue raises the question whether the parties had intended that a binding contract should come into force by the telex offer and letter acceptance of the parties, or whether they had intended to be bound only by a formal agreement specifying in detail all the terms and conditions.

It is a matter of construction of the telex offer and the letter of acceptance whether the agreement reached between the parties was subject to any further terms to be drawn up and agreed between the parties, that is to say, whether it is 'subject to contract'.

In the Federal Court case of *Lim Keng Siong & Anor v Yeo Ah Tee* [1983] 2 MLJ 39, the confirmation of a sale 'subject to contract' of a piece of land at the counter-offer price of RM5.20 per square foot in Singapore currency was held to constitute a concluded contract. The mere fact that a written agreement had to be drawn up and executed by the parties did not necessarily mean that there was no legally binding and enforceable agreement. It was held that the learned trial judge of the High Court, Wan Yahya J was right in granting specific performance of the agreement.

Similarly, in *Diamond Peak Sdn Bhd & Anor v DR Tweedie* [1982] 1 MLJ 97, it was held by the High Court (per Gunn Chit Tuan J) that an exchange of letters which culminated with a letter from the defendant who wrote that he was delighted that it was the plaintiff who was buying the land and that he would leave the 'technical details' to be sorted out by his lawyers constitute a complete agreement which was enforceable by an order of specific performance.

Following principles that have been established before it (including the Supreme Court case of *Ayer Hitam Tin Dredging Malaysia Bhd v YC Chin Enterprises Sdn Bhd* [1994] 2 MLJ 754), the Federal Court in the recent case of *Charles Grenier Sdn Bhd v Lau Wing Hong* [1996] 3 MLJ 327, decided that an acceptance of an offer to purchase two shophouses for the sum of RM450,000 'subject to the sale and purchase agreement' was capable of being enforced. It was held (per Gopal Sri Ram JCA at p 336) that:

> Such an agreement is termed as an 'open contract'. It is enforceable as if it was embodied in a document with all the attendant solemnity. In order to give it effect, the law will — acting out of necessity (see *Liverpool City Council v Irwin* [1977] AC 239) — imply terms into the contract for sale in order to make it work. See *Rojasara Ramjibhai Dahyabhai v Jani Narottamdas Lallubhai* [1986] 3 SCC 300, where it was held that there was to be implied in a contract for the sale of land a covenant on the part of the vendor to do all things necessary to give effect to the agreement.

But unlike *Charles Grenier* and a host of other 'subject to contract' cases before it (including *Diamond Peak* and *Lim Keng Siong*), neither the telex

offer nor the letter of acceptance in the present case states in any specific term that the offer or acceptance was subject to the preparation of a formal contract. Nor could any inference be drawn that the parties had intended this to be so. All factors point to a perfectly valid contract devoid of any vitiating elements. The parties (Malayan Flour Mills Bhd on the one part and Saw Cheng Chor and Saw Eng Cheong on the other), the subject matter (Lot 5020), the price (RM350,000) and the terms of payment (cash of RM250,000 and RM100,000 shares in Dindings Feedmills Sdn Bhd), have been identified with sufficient clarity in the telex offer. So is the letter of acceptance which states in no uncertain terms that the plaintiff was accepting the offer. I could come to no other conclusion that by their exchange of offer and acceptance, they had intended to be bound absolutely by the bargain on the terms agreed. A written agreement would be necessary only as a mere formality to spell out the manner in which the land and the shares are to be transferred to the respective parties.

I am therefore unable to accept defendant counsel's contention that the telex offer was subject to terms to be drawn up and agreed by the parties.

The success of the plaintiff's case, however, does not rest on the first issue, but on the second which I will now consider.

Second issue: Was the offer withdrawn?

First, I will state in brief that aspect of contract law involving offer and acceptance which I gleaned from *Cheshire, Fifoot and Furmston's Law of Contract* (12th Ed) at pp 29–43 which, in my judgment, has to be applied to settle this issue.

In deciding whether there is a concluded contract in a given case, the court will have to examine all the circumstances to see if a party may be assumed to have made a firm offer and if the other may likewise be taken to have accepted that offer — a situation often referred to as a meeting of the mind upon a common purpose or consensus ad idem.

In as much as an offer must consist of a definite promise to be bound on the terms specified, the acceptance must be communicated to the offerer by 'an external manifestation of assent, some word spoken or act done by the offerer or by his authorized agent which the law can regard as the communication of acceptance to the offerer'.

What constitutes an effective communication of acceptance must necessarily depend on the circumstances of the case. The offeree's intention to accept must be conclusive and he must not treat the negotiation between the parties as still open to the process of bargaining. He must unreservedly assent to the exact terms of the offerer. If while purporting to accept the offer as a whole, he introduces a new term which the offeror has not the chance of examining, he is in fact making a counter-offer. The effect of this in the eyes of the law is to destroy the original offer (see also s 7 of the Contracts Act 1950).

A The law on this point is well settled here as in other common law jurisdictions. It is embodied in the leading case of *Hyde v Wrench* (1840) 3 Beav 334 where a counter offer by the plaintiff to buy an estate for £950 which was originally offered by the defendant for £1000 was held to have abrogated the original offer that the plaintiff could no longer enforce the B defendant's promise to sell the estate at the price of £1000.

A counter-offer by the offeree not only fails as an acceptance. It also generally amounts to a rejection of the original offer, which therefore cannot subsequently be accepted (see *OTM Ltd v Hydranautics* [1981] 2 Lloyd's Rep 211 at p 214, cited at para 37 (Vol 1) *Chitty on Contracts* (25th Ed)).

C Having stated the law, I will now return to consider the evidence in the present case.

Only the second defendant Saw Eng Chee (DW1) gave evidence for the defence. It was not disputed that he was a witness to what transpired at his father's office when the plaintiff's party came to meet his father on D the morning of 15 January 1979 and later at the office of Ngan & Tan where the parties were supposed to sign the formal agreement reached earlier at the father's office. Save for some contradictions with regard to the person who were actually present at the father's office and later at the office of Ngan & Tan and as to whether he and his father protested when E Miss Chen Hong Eng acknowledged receipt of the plaintiff's letter of acceptance and issued the receipt for the payment by cheque of the sum of RM47,000, his evidence of what transpired did not differ materially from the evidence of the witnesses for the plaintiff.

It is clear to me that when the plaintiff's managing director Lee Soon F Lee, and his party (consisting of its solicitor Tang Khai Kit and its director Teh Kian Teik) met with Saw Cheng Chor at his office on the morning of 15 January 1979, they did not communicate their acceptance of the offer to buy Lot 5020 to the defendants, but had in fact intimated to Saw Cheng Chor the plaintiff's intention to buy the three other lots as well. Thereafter, it would appear from the notes of evidence that negotiations proceeded on G all the four lots (Lot 5020 included). It culminated in the parties deciding to reduce into writing the terms and conditions respecting the sale and purchase of the four lots.

Both Saw Eng Chee (DW1), the only witness for the defence, and three witnesses for the plaintiff — Lee Soon Lee (PW1), Tang Khai Kit H (PW2) and Teh Liang Teik (PW3) — gave more or less the same account of how the sale of the other three lots was brought about when they met his father Saw Cheng Chor at his office on 15 January 1979. Their evidence appear in the notes of evidence of Ong J as follows:

PW1 — p 5 of the notes of evidence para D: Examination in chief:

I

> We went to office of Ban Joo Seng Chan and met Saw Eng Chor and had further discussions. Present at this meeting were Teh, myself, Tang Khai Kit, Saw Cheng Chor and his son and another person. After discussions

Saw Cheng Chor agreed to sell the other three lots for RM120,000 and show the titles to the three lots. The titles were shown to Tang Khai Kit at the meeting. The titles show that three lots were in the name of Ban Joo Seng Chan which was a partnership. I was told that Saw Eng Chong and Saw Cheng Chor were partners in the firm.

PW2 — p 19 of the notes of evidence para D: Examination in chief:

At the office, I met Saw Cheng Chor, one of his sons and an elderly Chinese man. Teh Liang Teik spoke to Saw Cheng Chor whether apart from sale of Lot 5020 he was prepared to sell the other three adjoining lots. Mr Saw Cheng Chor agreed to the sale of the other three adjoining lots. Saw Cheng Chor informed that there were qualified titles to the three lots although earlier they were TOL. Saw Cheng Chor's son produced the three issue documents of title and show them to me. I checked the titles and found all three to be registered in the partnership of Ban Joo Seng Chan. We proceeded to discuss terms and conditions for sale and purchase of all four lots. Upon finalization of the terms, I was requested to follow Saw Cheng Chor's son to the office of Ngan & Tan.

PW3 — p 50 of the notes of evidence para C: Cross-examination:

On 15 January 1979 at the office of Ban Joo Seng Chan we only discuss about the other three lots because I had already accepted the offer for sale of Lot 5020. The price for the three lots remain at RM120,000.

It was agreed that all four lots were to be sold subject to the signing of a formal agreement. P8 was an offer from co-owners.

In the light of these evidence, the question to ask here in whether there was in fact counter-offer on the part of the plaintiff.

There is a dearth of local authorities that one could rely on as precedents as to what could and could not constitute a counter-offer. There is no case law befitting the factual matrix of the present case that I could draw on. However, the extent to which the court would be prepared to hold that counter-offer will destroy the original offer is well illustrated in *Tan Chee Hoe & Anor v Ram Jethmal Punjabi* [1983] 2 MLJ 31. In that case, the plaintiff purported to accept the respondent's offer to sell his property by signing the acceptance copy of the letter of offer and had through his solicitors sent a cheque for the sum of RM44,000 to the defendant's solicitors together with the signed acceptance copy to which the words 'who will then hold as stakeholders' were added after the words 'Advani Ho Morris & Kumar' (the name of the defendant's solicitors' firm). It was held by the High Court of Singapore (per Wee Chong Jin CJ) that the addition of the words by the plaintiff on the acceptance copy had in fact introduced a material variation to the offer and amounted to a counter-offer. His Lordship approved the passage in 8 *Halsbury's Laws* (3rd Ed) at p 75 that:

In order to constitute acceptance, the assent to the terms of an offer must be absolute and unqualified ... . If the acceptance is conditional, or any fresh term is introduced by the person to whom the offer is made, his expression of assent amounts to a counter-offer, which in turn requires to be accepted by the person who made the original offer.

Generally, a counter-offer (as in *Tan Chee Hoe & Anor v Ram Jethmal Punjabi* and in *Hyde v Wrench*) involves the introduction by the offeree of a material variation of the terms of an offer of the same subject matter. In the instant case, however, by proposing to purchase all the four lots (which could only be for an increased consideration), the plaintiff's managing director Teh Liang Teik had in fact taken upon himself not only to vary the term but also subject matter of the original offer. In my judgment, by doing so, he had in fact made a counter-offer, the effect of which was to divert the mind of Saw Cheng Chor away from his original telex offer, such that it could be legitimately assumed that he was no longer minded to keep that offer open, the effect of which is the same as if he had withdrawn that offer.

For the acceptance of the original offer to be effective, there must be a fresh offer on the part of Saw Eng Chor on exactly the same term as in the original telex offer. I could find no such evidence to indicate this. Standing alone by itself without more, the receipt with the endorsement stating that the sum of RM47,000 was received by Ngan & Tan as stakeholders for the disposal of Lot 5020 would not be sufficient evidence that a fresh offer had in fact been made.

For the reasons stated above, I am unable to agree with counsel for the plaintiff that there was a concluded contract between the parties on the telex offer capable of being enforced by this suit. The plaintiff's claim must therefore fail.

The plaintiff's claim is dismissed with costs.

Claim dismissed.

Reported by Yap Chee Ying